SEBOR (SARAWAK) TRADING SDN BHD

v.

SYARIKAT CHEAP HIN TOY MANUFACTURE SDN BHD & ANOTHER APPEAL

COURT OF APPEAL, KUALA LUMPUR
DENIS ONG JCA
MOHD SAARI YUSOFF JCA
MOHD NOOR AHMAD JCA
[CIVIL APPEAL NO: Q-02-374-95]
28 MARCH 2003

SHIPPING: *Carriage of goods - Liability of carrier - Liability of carrier's shipping agent - Goods lost after being discharged from vessel - Whether carrier breached contract to ship goods from consignor to consignee - Exemption clause in bill of lading, whether absolved carrier of liability - Whether consignor had sufficient notice of exemption clause - Whether carrier's shipping agent negligent in loss of delivery order - Whether carrier negligent - Monetary limit of carrier's liability*

CONTRACT: *Breach - Contract of carriage - Non-delivery of goods - Whether carrier breached contract to ship goods from consignor to consignee - Exemption clause in bill of lading, whether absolved carrier of liability - Whether consignor had sufficient notice of exemption clause - Monetary limit of carrier's liability*

CONTRACT: *Exemption clause - Liability of carrier - Cesser of liability - Loss of goods after being discharged from vessel - Non-delivery of goods to consignee - Whether exemption clause in bill of lading absolved carrier of liability - Whether consignor had sufficient notice of exemption clause*

TORT: *Negligence - Carriage of goods by sea - Whether carrier negligent for loss of goods after being discharged from vessel - Whether carrier's shipping agent negligent for loss of delivery order - Monetary limit of carrier's liability*

This was an appeal by the 1st and 2nd defendants against the decision of the High Court allowing the plaintiff's claim against them for damages for breach of contract (non-delivery of goods) and for negligence (loss of goods). The plaintiff was the consignor of certain goods that were to be shipped to the consignee whilst the 1st and the 2nd defendants were the carrier and the carrier's shipping agent respectively. The issues before the

Court of Appeal were: (i) whether the loss of the delivery order and of the goods after they were discharged from the vessel was due to the negligence of the shipping agent; and (ii) whether exemption cl. 2(c) in the bill of lading would absolve the carrier of liability for breach of contract.

Held:
Per Mohd Saari Yusoff JCA

[1] Even if the original delivery order was lost due to the carelessness of the clerk of the shipping agent, it was of no consequence. This was because the photocopy of the original delivery order did not have a customs registration number – which meant that the goods were removed from the container yard without the clearance of the customs department and of the port authority. Furthermore, the original bill of lading and the invoices were being kept by the consignor's bankers (pending payment by the consignee in exchange for those documents) – which meant that the persons who claimed the goods from the port authority were not in possession of those documents. Additionally, the fact that the photocopy of the original delivery order was not signed by the clerk of the shipping agent also confirmed that it was a forgery. Consequently, the 2nd defendant/shipping agent was not negligent. (p 386 b-g)

[2] The 1st defendant/carrier had also established that there was a cesser of liability by virtue of exemption cl. 2(c) in the bill of lading. (*Sze Hai Tong Bank v. Rambler Cycle Co Ltd* [1959] AC 576 PC distinguished.) Furthermore, the fact that a director of the plaintiff/consignor had signed on the overleaf of the bill of lading (on which cl. 2(c) was imprinted) must be taken to mean that the plaintiff/consignor had reasonably sufficient notice of the exemption clause. (pp 388 b-d, g-h & 389 a)

[Defendants' appeal allowed; orders of High Court set aside.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Ini adalah rayuan daripada defendan pertama dan kedua terhadap keputusan Mahkamah Tinggi membenarkan tuntutan plaintif terhadap mereka berkenaan pampasan untuk salah-ingkar kontrak (kegagalan menyerahkan barang) dan untuk kecuaian (kehilangan barang). Plaintif merupakan pengirim konsainan beberapa barang yang ingin dihantar kepada penerima konsainan manakala defendan pertama dan kedua masing-masing adalah pengangkut dan agen

perkapalan pengangkut. Isu-isu di hadapan Mahkamah Rayuan adalah: (i) sama ada kehilangan pesanan penghantaran dan barangan tersebut selepas dilepaskan daripada kapal berkenaan berpunca daripada kecuaian agen perkapalan; dan (ii) sama ada pengecualian melalui kl. 2(c) dalam bil lading akan membebaskan pengangkut daripada liabiliti atas salah-ingkar kontrak.

Diputuskan:
Oleh Mohd Saari Yusoff HMR

[1] Jikapun pesanan penghantaran yang asal tercicir akibat daripada kecuaian kerani agen perkapalan tersebut, ianya tidak mempunyai apa-apa kesan. Ini adalah kerana salinan photostat pesanan penghantaran yang asal tidak mengandungi nombor pendaftaran kastam – yang bermaksud bahawa barangan tersebut telah dialihkan daripada kawasan kontena tanpa kebenaran jabatan kastam atau pihak pelabuhan. Lagipun, bil lading asal dan invois disimpan oleh pihak bank pengirim konsainan (yang akan diberi kepada penerima konsainan sebaik sahaja ia membuat pembayaran) – yang bermaksud bahawa orang yang menuntut barangan tersebut daripada pihak pelabuhan tidak memiliki borang-borang berkenaan. Tambahan pula, fakta bahawa salinan photostat pesanan penghantaran asal tidak ditandatangani oleh kerani agen perkapalan tersebut mengesahkan bahawa ia adalah palsu. Maka dengan itu, didapati bahawa defendan kedua/agen perkapalan tidak cuai.

[2] Defendan pertama/pengangkut telah juga membuktikan bahawa terdapat penamatan liabiliti melalui pengecualian dalam kl. 2(c) dalam bil lading. (*Sze Hai Tong Bank v. Rambler Cycle Co Ltd* [1959] AC 576 PC dibezakan.) Tambahan pula, fakta bahawa seorang pengarah plaintif/pengirim konsainan telah menandatangani di belakang bil lading (di mana kl. 2(c) tertera) semestinya membawa maksud bahawa plaintif/pengirim konsainan dengan wajarnya telah mengambil notis kepada klausa pengecualian tersebut.

Rayuan defendan-defendan dibenarkan; perintah Mahkamah Tinggi diketepikan.]

Case(s) referred to:
Australasian United Steam Navigation Co v. Hiskens 18 CLR 646 ***(refd)***
Dr Shanmuganathan v. Periasamy Sithambaram Pillai [1997] 2 CLJ 153 FC ***(refd)***
Malayan Thread Co Ltd Sdn Bhd v. Oyama Shipping Line Ltd & Anor [1973] 1 MLJ 121 ***(refd)***
Sze Hai Tong Bank Ltd v. Rambler Cycle Co Ltd [1959] AC 576 ***(dist)***

Legislation referred to:
Carriage of Goods by Sea Act 1950, 1st sch, art IV, r. 5
Rejang Port Authority (Condition of Business) By-Law 1971, s. 35(1)

Other source(s) referred to:
Chitty on Contracts, 24th edn, vol 1, p 679
William Tetley, *Marine Cargo Claims*, 3rd edn, p 641

For the appellant/1st defendant - Michele Lau; M/s Lau & Co
For the appellant/2nd defendant - George Lim; M/s Battenberg & Talma
For the respondent - Kho Lik Kiat; M/s Kho & Poh

[Appeal from High Court, Sibu; Suit No 18-1990]

Reported by Gan Peng Chiang

JUDGMENT

Mohd Saari Yusoff

In the High Court, the plaintiff/consignor (the respondent) in this appeal sued the first defendant/carrier ("D1") and the second defendant/shipping agent ("D2") for damages for breach of contract and negligence respectively. Judgment was entered against both D1 and D2, hence this appeal.

The facts of the instant case were that on 15 April 1989, one Chin Yew Choy entered into an oral agreement with Syarikat Cheap Hin Toy Manufacture Sdn. Bhd., the plaintiff in the High Court and the respondent herein whereby the respondent would supply fireworks and firecrackers ("the said goods") valued at RM457,800 to a company known as Hua Ho Co. of No. 76, Sg. Antu, Sibu, Sarawak. Thereafter, the said goods were loaded into D1's vessel known as MV Kris Lemona (the Ship) at Port Klang, Selangor. The necessary bill of lading ("the BOL") (P1) was prepared. Later the BOL together with the relevant invoices and customs declarations were submitted to the respondent's bank (Bangkok Bank) which in turn transmitted those documents to MUI Bank, Sibu, Sarawak.

On 20 April 1989, the ship (Kris Lemona) carrying the said goods sailed from Port Klang to Sibu and arrived on or about 25 April 1989. On arrival, the ship discharged its cargo including the said goods. The said goods packed in three containers were placed under the custody of the Rejang Port Authority ("the RPA") in the container yard of the RPA. Later, it was discovered that the said goods were missing from the three containers.

At all material times, D2 was the shipping agent for D1. It is not in dispute that D2 did receive the delivery order ("the DO") in respect of the said goods which were covered by the BOL. On 10 May 1989 the DO was found missing from D2's office.

The issues for determination are:

i) whether D2 was negligent

ii) whether cl. 2(c) of the BOL absolved D1 from liability for the alleged breach of contract.

On The First Issue

On this issue, the question posed is whether the DO which was missing had caused the loss of the said goods. In this regard, it is pertinent to advert to the unchallenged evidence of DW1 (an executive with D2) on the procedure of taking goods out of the godown of the Customs Department Sibu (the Customs) namely:

i) a consignee named in the BOL must furnish the original BOL.

ii) after the shipping agent and the consignee had exchanged documents, D2 was required to endorse the DO.

iii) the customs would check the relevant documents to ascertain whether the particulars contained therein tallied with the customs declaration.

iv) the customs would assign a registration number to all documents.

v) the customs would check the goods to ascertain whether it was dutiable.

At all material times, DW6, an Assistant Superintendent of Customs, was attached to the godown section at the RPA. In the evidence of DW6, he said that in the case of prohibited goods such as firecrackers, they had to be cleared by the customs. Without the custom's approval, the RPA would not release the said goods. Further the original BOL had to be produced. Looking at the photocopy of the DO (P10), he said that it had no customs registration number which meant that the said goods mentioned in the BOL could not have gone through the customs. DW6's evidence was reinforced by the evidence of DW5, the Superintendent of Customs.

DW7 was a senior shipping clerk in charge of all delivery orders received by D2. He testified that he received the original DO in respect of the said goods. He could not explain how the DO in respect of the said goods went missing. In any event, he said that the signature appearing in the photocopy (P10) was not his. As a senior clerk in charge of delivery orders, he had the authority to sign the DO for transmission to the RPA.

From the abovestated evidence, it is apparent that, even if it is true that the original DO was lost due to the carelessness of DW7, we hold that such loss is of no consequence for the following reasons:

i) the fact that the photocopy (P10) was not assigned with the customs registration number clearly showed that whoever was responsible for removing the said goods from the container yard of the RPA, did so without clearance from the customs and the RPA.

ii) the original BOL and the invoices were kept by MUI Bank pending payment for the said goods by the consignee in exchange for the documents. Thus, whoever claimed the said goods from the RPA was not in possession of valid documents.

In order to meet the requirement of s. 35(1) the RPA (Condition of Business) By-Law, 1971, it was the responsibility of a shipping agent to endorse the DO for the purpose of claiming the said goods from the RPA. In this case, the signature appearing in the photocopy of the DO (P10) was purported to have been endorsed by DW7. The fact that the DO (P10) was not signed by DW7 confirmed that the DO (P10) was a forgery.

We are of the view that had the learned trial judge directed his mind to the evidence as enumerated above which he did not, his Lordship would have arrived at the same conclusion as we did. (*Dr Shanmuganathan v. Periasamy s/o Sithambaram Pillai* [1997] 2 CLJ 153). Non-direction tantamounts to misdirection.

On this issue, our finding is in the negative, that is to say, that D2 was not negligent.

On The Second Issue

The BOL (PI) which covered the said goods contained cl. 2(c) which reads:

> (c) in all other cases the responsibility of the carrier whether as carrier or as custodian or bailee of the goods shall be deemed to commence only when the goods are loaded on the ship and to cease absolutely on discharge when they are free of the ship's tackle.

The learned counsel for the respondent/plaintiff submitted that cl. 2(c) of the BOL had no application as non-delivery of the said goods would tantamount to defeating the fundamental object of the contract to wit the proper delivery of the said goods to the consignee. In support, he cited Privy Council's case of *Sze Hai Tong Bank Ltd v. Rambler Cycle Co. Ltd* [1959] AC 576 (JC).

In *Malayan Thread Co. Ltd. Sdn. Bhd. v. Oyama Shipping Line Ltd. & Anor* [1973] 1 MLJ 121, the facts of that case were that the plaintiffs shipped cotton sewing thread on the first defendant's ship to be conveyed from Kobe in Japan to Port Swettenham in Malaysia. On arrival at Port Swettenham, the goods were discharged from the ship. Later, after the ship had discharged the goods at the port but before the delivery of the goods to the consignee, 15 cartoons of the goods were stolen by a person or persons unknown. The first defendant *inter alia* relied on cl. 15 of the BOL. Clause 15 provided that "the ship's liability shall cease as soon as the goods leave the ship's deck and/or tackle".

In that case, Raja Azlan J (as he then was) at p. 122 said:

> ... And it is no less *prima facie* within clause 15:
>
> > In any case the company's liability shall cease as soon as the goods leave the ship's deck and/or tackle.
>
> The words in that clause are very clear and adequate for the purpose and it must be held to be operative and effectual to protect the first defendant. (See *Chartered Bank of India, Australia and China v. British India Steam Navigation Co Ltd* [1909] AC 369]. In that case the exemption clause reads *(inter alia)*:
>
> > ... In all cases and under all circumstances the liability of the company shall absolutely cease when the goods are free of the ship's tackle ...
>
> The goods were discharged at Penang and stored in a shed on the jetty and they were stolen by a servant of the landing agents. It was held that the fraudulent misappropriation by the servant of the landing agents was not treated as the fraudulent act of the shipping company, who were thereby protected by the exemption clause from any liability whatsoever.

On the question of fundamental breach, in the same case, his lordship Azlan Shah observed:

> In *Sze Hai Tong Bank*'s case, the shipping agents released the goods against a banker's indemnity when they knew fully well that they ought not to do so except against the appropriate bills of lading.
>
> Thus, where the servant or agent had deliberately flouted one of the bounden obligations of the contract, then that act is referable to the principal's act; in such circumstances, the principal cannot take refuge under an exemption clause.

From the above, it can be seen that in the *Sze Hai Tong* case, the shipping agent wrongfully released the goods. Unlike that case, here, the loss of the said goods was the work of person or persons unknown, who fraudulently removed them from the custody of the RPA. In this regard, with greatest respect, we disagree with the learned judge's finding when he said:

> In my view, clause 2(c) must therefore be limited and modified to the extent necessary to enable effect to be given to the main object and intent of the contract. It must at least be modified so as not to permit the 1st Defendant as the shipping company and/or its agent, in the circumstances of this case, to disregard its obligations as to delivery.

Thus, on the facts and circumstances of this case, we hold that D1 has established that there is cessor of liability covered by cl. 2(c) of the BOL (P1).

On Sufficiency Of Notice

Chitty on Contracts (24th edn) vol. 1 p. 679 states:

> **Reasonable sufficiency of notice.** It is the third of these rules which has most often to be considered by the courts. The question whether the party tendering the document has done all that was reasonably sufficient to give the other notice of the conditions is a question of fact in each case, in answering which the tribunal must look at all the circumstances and the situation of the parties. But it is for the court, as a matter of law, to decide whether there is evidence for holding that the notice is reasonably sufficient.

En. Kho, learned counsel for the respondent, submitted that the exemption clause (cl. 2(c)) which was stated on the reverse side of the BOL (P1) must be brought to the notice of the respondent at the time of entering into the contract. It is true that no evidence was led that anyone had brought to the notice of the respondent regarding the exemption clause in BOL (P1). However, the fact that PW4 (a director of the respondent company) had signed on the reverse side of the BOL which contained the exemption clause, it could be inferred that PW4 must have been aware of the said clause. It

is noted that in preparing the BOL, standard format was used and it could be argued that the respondent must have been familiar in sending goods by sea, which involved high risks. On the facts and circumstances of the instant case, we are satisfied that the respondent had reasonable sufficiency of notice regarding the exemption clause.

On Quantum

Our attention was drawn to cl. 16 of the BOL. Clause 16 provides that the liability shall not exceed the invoice value of sterling £100 per package or unit. Such condition is consistent with r. 5 of Article IV of Carriage of Goods by Sea Act 1950 (Act 527) which reads:

> 5. Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding £100 per package or unit or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.

In *Australasian United Steam Navigation Co. v. Hiskens* 18 CLR 646 at p. 678, Issacs J observed:

> If he (the shipper) does not state their value above that sum, it is an admission that they are not worth more. He has a fair option, so long of course as the extra freight is not unreasonable. It is not an exemption from liability; it is an agreement as to value made between the owner who knows and the carrier who does not and the freight is proportionate to the value.

In *Marine Cargo Claims* (3rd edn) by William Tetley, the learned writer at p. 641 says that a container is a package.

Looking at the BOL, it is observed that nowhere in the BOL (PI) was the value of the goods stated. Further, there was no mention of packages or units. From the BOL, what was clear was that the said goods were packed in three containers. Thus, in case we err on finding of liability, we hold that the respondent is entitled to £300 or its equivalent amount in Malaysian currency for loss of the said goods at the rate of exchange prevalent at the time of such loss.

Conclusion

For reasons given above, we allow both appeals with cost here and in the court below and set aside the order of the High Court. Deposit to be refunded to the appellants.

My learned brothers Denis Ong Jiew Fook JCA and Mohd. Noor bin Ahmad JCA have read this judgment in draft and have expressed their agreement with the same.